UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

ADKINS, et al.,
Plaintiffs,
vs.
APPLE, INC., et al.,
Defendants.

No. C 14-01619-WHO

San Francisco, California
Wednesday, October 14, 2015

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND RECORDING 3:14 - 4:05 = 51 MINUTES

APPEARANCES:

For Plaintiffs:

Cutter Law, P.C.
401 Watt Avenue
Sacramento, California 95864
BY: CURTIS BROOKS CUTTER, Esq.
JOHN R. PARKER, JR., Esq.

1620 South Friendswood Drive
Ste Apple
Friendswood, Texas 77546
BY: RENEE FAGAN KENNEDY, Esq.

For Defendants:

Morrison & Foerster, LLP
707 Wilshire Boulevard
Suite 6000
Los Angeles, California 90017
BY: PURVI GOVINDLAL PATEL, Esq.

(APPEARANCES CONTINUED ON NEXT PAGE)

APPEARANCES: (Cont'd.)

For Defendants:

Morrison & Foerster, LLP
425 Market Street
San Francisco, California
94105
BY: PENELOPE ATHENE PREOVOLOS, Esq.
MARGARET ELIZABETH MAYO, ESQ.

Transcribed by:

Echo Reporting, Inc.
Contracted Court Reporter/
Transcriber
echoreporting@yahoo.com

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THE CLERK: Calling civil matter 14-1619, Adkins, et al. versus Apple, Incorporated.

Counsel, please come forward and state your appearance.

MR. CUTTER: Afternoon, your Honor. Brooks Cutter for Plaintiffs. With me are Renee Kennedy and John Parker.

THE COURT: Good afternoon.

MS. PREOVOLOS: Good afternoon, your Honor. Penelope Preovolos for Defendants, and I have with me my colleagues, Ms. Patel, Purvi Patel, and ms. Mayo, Maggie Mayo.

THE COURT: Afternoon.

All right. Sorry to keep you so long waiting for your time at the podium.

Mr. Cutter, welcome to this case, and so tell me what your role is in this case now and going forward. I know that you came in a couple of months ago I guess.

MR. CUTTER: Yeah, absolutely, your Honor. So my role, as I understand it, would be to be co-lead counsel in the case, and that's a role I'm accustomed to, that I've had in lots of other class actions and MDL matters, and I'm pleased to join in the case and to, you know, bring some additional resources and class expertise to the matter that

Ms. Kennedy's been earnestly litigating for the past several years.

THE COURT: All right. So before -- I've got a number of comments about -- about the motion, but I have a factual question which is when was the first time the Plaintiffs were aware that Apple's position was that Ms. English received a new rather than a refurbished phone? I suspect you will both have different perspectives on that, but, Mr. Cutter, do you know?

MR. CUTTER: Our perspective is that we became aware of that at the time they filed their opposition to class certification. In discovery they denied that it was a refurbished phone, but they had so many objections to the use of the term "refurbished" that that wasn't necessarily any kind of an indication that they were contending that it was not, that it was a new phone.

Ms. Preovolos?

MS. PREOVOLOS: Your Honor, I don't think there's going to be a dispute. We disclosed that the phone was new for the first time in the opposition brief because we learned of that fact shortly before we -- very shortly before we filed the opposition brief, and to put a little context around that, which I think would be useful for the Court, we have been earnestly trying to answer a question Plaintiffs have asked and we've asked, which is is Apple

able to determine in a systemic way whether a particular Apple Care Plus or APP consumer who received a replacement unit received a new, remanufactured, or what we're calling reclaimed part. And it turns out we still don't know the answer to that. We have not been able to do it, but what we found out we could do in the course of that exercise was that it is possible to take a particular serial number -- and we've been trying to figure this out from the beginning of the case obviously, but in our work with Mr. Lanagan (phonetic), whose deposition was the one sort of on the technical side of the Apple case, during our work with Mr. Lanagan, we became aware -- and I need to be a little careful because this is in -- in open court, in terms of Apple's confidentiality -- but we became aware that for an individual serial number, it is possible looking at some very highly proprietary databases which only a few people have access to, we are able to -- we were able to figure out the answer to that question for Ms. English and for Ms. Kennedy, and -- but we are talking about a process that took hours and days of time, and it's not a simple answer. We're confident of it, but the other point is we weren't totally confident of it until the day we filed the brief, and I was not about to make that representation to anyone until we were confident of it, and it took a lot of checking and rechecking. Ms. May did a lot of the legwork on that, as

did our clients, and I wish it were simpler.

The truth is, you know, it's not an everyday issue that people care about in the real world, but that's the answer. There's no dispute about it.

THE COURT: All right. Well, so, I mean, it is an issue that I care about.

MS. PREOVOLOS: Of course.

THE COURT: And it's pretty relevant to at least some of the issues in this motion, and I'm wondering what the best -- fastest and most efficient way of letting the Plaintiffs test your allegations with respect to that, your evidence with respect to it is. Is it the deposition of Mr. Lanagan again?

MS. PREOVOLOS: Well, I guess I would say that the issue of what we could know and what we did know was discussed during the deposition of Mr. Lanagan. The Plaintiffs had three weeks before they filed their papers to seek that discovery, and they didn't do it. They didn't -- they didn't ask that question.

THE COURT: Yes, but what you've alleged is, I think, in some -- with some issues dispositive, maybe with many issues. And so -- and you allege that only -- and I'm not blaming you because of what you're finding out, but so my -- but it seems to me that the Plaintiff's entitled to test it.

MS. PREOVOLOS: I think the -- my point is that the Plaintiff had three weeks to try to test it, and they didn't do that.

THE COURT: But you didn't make the allegation. They were testing something that they didn't know.

MS. PREOVOLOS: No, no, no. Your Honor, the Plaintiffs' brief wasn't due until three weeks after --

THE COURT: Oh, I see what you're saying.

MS. PREOVOLOS: -- we made that allegation and discovery was opened. The Plaintiffs are suggesting that we should depose their newly disclosed reply expert two days before this hearing. My point is if the Plaintiffs had serious questions about that evidence, they've had three weeks to ask us for discovery. Discovery wasn't closed. Discovery has been wide open. They were suggesting we take it. They took discovery of our experts during that time period. They never sought discovery of this issue.

THE COURT: If -- do you care?

MR. CUTTER: Well, your Honor, I think I care about several things about this. First of all, I would argue that Ms. English is more than adequate and typical in terms of having bought a product, Apple Care Plus, and not -- and having had a false representation made to her and, as a result, having paid more than she would have. In effect, what she thought she was getting was a product that promised

her two potential incidents of new phones in exchange for $99 and $79 per incident. In effect what she received was a lottery ticket for potentially a new phone or potentially a used phone. That transaction was complete at the moment she paid the money for the warranty, and the case law is clear that having overpaid for the warranty, she then -- it doesn't matter if eventually her ship came in and she had new phones or not. There are going to be some people in the class as to whom that's true who got old phones, and they're going to be entitled to a different kind of damages, an additional set of damages than the people who simply overpaid for what I'll call the lottery form of Apple Care that they actually received.

And this -- this line of thinking, you know, dovetails exactly -- I went back, you know, as part of familiarizing myself with the case -- with the Court's thinking in the 12(b) motions, your analysis, for example, with Mr. Galindo's. Mr. Galindo purchases the warranty, never uses it, but, nevertheless, he has Article 3 standing because he overpaid for the warranty. Ms. English is similarly situated She overpaid for a warranty that, as we'll eventually establish when we get into damages models, people will pay less every single time for a warranty that offers a used phone replacement than they will for a warranty that offers a brand new phone replacement, and --

THE COURT: So you're telling me you actually don't care about whether Apple's allegation is verified now by you or not?

MR. CUTTER: I --

THE COURT: You think it probably is true?

MR. CUTTER: You know, I have no reason not to take Ms. Preovolos, who's distinguished counsel, lot of experience, that she -- likely it's true, but I would say this about that. This is what I would ask the Court to do, that if it's important -- and it probably is important, I believe, actually, that we do eventually have a subclass representative who got an old phone, and I think we can find one. I think we can identify one with reasonable expediency and -- and add them in in addition to Ms. English in this case, and that's routinely done in cases like this in circumstances like this arising. There's certainly no delay on our part having just learned of this fact with respect to Ms. English.

So rather than get into a land ward or trench warfare over whether Ms. English's phone was new or used, we'll come up with some additional folks, but it will be important to have a process that we agree on to test that. In other words, to talk to the guy, you know, one of the three people who can google it into their computer and say is this a new or used phone, and to establish ourselves the bona fides of

that person in the process.

So I think that perhaps I'm coming at it a little differently than you, but we get to the same place. It is important to figure it out.

THE COURT: Okay. Well, let me tell you where -- where I'm coming out in general, and -- and then -- and I heard your -- your take on some of this already, but let me just step back. I'm right now inclined to deny certification. The -- first of all, I don't think there's a theory of liability -- particularly if this evidence is correct, I don't think there's a theory of liability that provides a basis for a certifiable class. So I've identified five theories. One is class members who purchased Apple Care Plus with the replacement iPhone, and the initial replacement would not count as an accidental damage incident, but it did.

Apple admits the policy but complied with it, and -- and the Plaintiffs offered no evidence to the contrary except for what Ms. English had to say.

Second, Apple improperly packaged refurbished phones in a plain white unbranded box. If Ms. English got a new phone and not a refurbished phone, I think there are typicality and adequacy problems with that.

Apple employees -- the third one is Apple employees orally misrepresented the replacement phones will be new.

Again, Ms. English got a new phone, and also there is no common course of conduct shown in the evidence.

Fourth, Apple misrepresents in service plans that replacement iPhones will be new or equivalent to new. Again, Ms. English got a new phone, and she didn't rely on the service plans in purchasing the iPhone. I don't understand the theory of vicarious reliance.

And then, fifth, Apple fraudulently omits that replacement phones may be -- may be refurbished. Again, Ms. English got new phones, but there's insufficient evidence of uniformity of conduct.

And then I'm also interested -- it's not clear to me from the briefing -- maybe it should be -- whether Ms. English received the document that was called "Genius Bar Work Authorization and Service Confirmation" when she purchased the February 13th Apple Care Plus, but -- but that refers to new or refurbished parts or products.

So I have trouble with those theories. I have real trouble with the adequacy of class counsel and not you, Mr. Cutter, but the way that this case has been litigated from the get go has been very troublesome. The -- the fact that the Plaintiffs received gifts, the first Plaintiffs received gifts from Ms. Kennedy before they bought their phones, Ms. Kennedy's substantial involvement with buying Apple products, the fact that five -- all the original Plaintiffs

withdrew and then two came in and then one left and the one, Ms. English, bought her phone for her son. It just taints the -- the case in a way that I find really problematic. I appreciate the fact that you're here, but that's -- that really has been a problem, and then, frankly, the damages theory is -- is hard for me to wrap my head around. So I want you to talk -- talk to me about that. It doesn't justify how the damages flow solely from the Defendant's conduct. The models seem to compensate class members who weren't harmed, and -- and the restitutionary disgorgement theory is one that I just wrote about in Cacent v. Bigalo which I just don't think works in this setting where the -- the class members actually received a product in return. There's got to be -- there's got to be something more than getting the whole price of Apple Care Plus.

So, anyway, those are among the problems that I have. So it's a -- it's a high hill you're climbing up, Mr. Cutter. So go ahead.

MR. CUTTER: Let me begin.

THE COURT: Okay.

MR. CUTTER: So I'll begin with your point four because I think it's important to the over-arching approach that we have to the case, and that's with the service plan and the service plan product. And, you know, I had to think about this for a while too, but really the product that's at

issue here is the service plan, and that service plan contains a core false statement, which is that the phones that you receive are new or equivalent to new in performance and reliability. That's false, and that's Doctor Peck, who's preeminent in his field, who says that -- well, first of all, it's false because even by Apple's own admission, less than half the phones that you're likely to get are new. Some percentage are lemon phones or remorse phones, as they call them, that people sent back after a couple of weeks and they recycled through. Another percentage are phones that they parted out and sent back to China and had them reassembled and sent back.

So, clearly, the new part is not true. It's only true in some cases.

The second piece of that, the new in performance and reliability is true and simple junk science. It's not true. It's demonstrably false, and Doctor Peck will be dispositive on that issue.

So we begin with I think one of the clearest cases of a false statement at the class certification stage of many cases that I've seen. We have a clear false statement. Now --

THE COURT: Did Ms. English rely on that, on the terms and conditions?

MR. CUTTER: I was just going to move to that.

THE COURT: Okay.

MR. CUTTER: And so -- and so we then have to look at -- at how that -- where that statement appears, okay, and how that statement pervades Apple and all its training and everything that they do, and so it's in the terms and conditions. It's in the training materials that we submitted, your Honor. The consistent flow of the workflow of the training is when you get to this point, you're going to review the terms and conditions which say that phones are new, that the phones you'll get are new or new in performance and reliability. And so that's the core statement that is always trained, and so that's a core false statement that's repeated in the training, repeated in the terms and conditions in which the -- every Apple employee that testifies -- maybe not every. I shouldn't -- I'm not as familiar with the record as I would be if I had taken these depositions, but clearly Mr. Bund (phonetic) testified that that's what he always told folks. Tara Ford said that that's what the standard was, new or like new. So they're perpetuating and stating a false standard. And so what Ms. English heard from Mr. Posturak (phonetic) was the exact statement that's in the terms and conditions, that you'll get a new phone. He left out the second part, and I don't blame him because if -- if two of the four adjectives that you're hearing or the only two adjectives are new or like

new, then I don't blame him for conflating them and just saying you're going to get a new phone. But there's no question that we can trace that tree, from all the training that Apple does, into the terms and conditions, into the plan itself and that that's what he's communicating. He's orally communicating the core written terms and conditions to Ms. English, and that's what she's relying upon when she -- when she makes that purchase, and I don't think that any case has said that it's -- that it's less actionable if the Plaintiff hears it rather than reads it, as long as we can trace the same source, and here we easily can do that from the core false statement that permeates the terms and conditions and the training and the Apple Care Plus and Apple Care documents themselves.

And the interesting thing about this is -- which kind of in my mind it's not necessary for us, but it -- but it kind of shows scienter is that Apple knows how to disclose it in that document that you alluded to. After they've taken your money and after they -- when you're on your way out the door, they E-mail you or stick a receipt in the bag that says that, "By the way, we may have repaired your phone with used or refurbished parts," or you may have received used or refurbished parts, a term that they're very careful not to use when they're selling the thing to you up front. So they knew what they were doing, but they chose

deliberately to word it and to use a completely different term, one that has no basis in science or truth. I mean, if you think about it, parts are like humans have heartbeats. You know, everything -- everything, every part has a certain number of cycles in it, and Apple's not tracking that at all when they take these things back. If they pass the test, they send them along, you know. I like Warren Miller's statement that for skiers -- that moguls are like heartbeats. We all have a finite memory, but --

THE COURT: I have about one.

MR. CUTTER: Right.

THE COURT: But the -- so in answer to the question that I had --

MR. CUTTER: Yeah.

THE COURT: -- that Ms. English received it but it was after, and your point is that it's not really -- it's not relevant to the claims that you're bringing because you're talking about sales as opposed to after sales. Is that the --

MR. CUTTER: Exactly. And, if anything, it's helpful to us because it shows the difference between what a fulsome disclosure is, when it's too late to matter, and the false disclosure that's made up front. So the point about -- and so then returning to the point about the product, the service plan being the product.

So at the time Ms. English completes that purchase, she's overpaid for the warranty plan, and to me the cases that -- the case that's most similar to this one is Cole v. Asyrian, and that's Judge Gutierrez's analysis of a cell phone insurance plan in the Central District, and he -- it's really very similar, and what he concludes is that there also the class representative ended up getting a new phone, and he said the point isn't that they got the new phone. It's that they overpaid for this insurance, that they paid more for the insurance than they would have paid if they knew it just gave them a possibility of getting a new phone. So that's the way we have to think about it. We have to think about it what product did you buy, did you buy a product that promised you a new phone or did you buy a product that promised you a chance of a new phone.

There's a price differential that we'll establish, and that's kind of a natural segue into the damages analysis. We are not going to claim that the proper measure of restitution is the full price of the plan. I agree with you on that. What we're going to claim and establish through Christian Tragulus (phonetic) is that the appropriate measure of damages is the difference between what a consumer would pay for a plan that offers you a new phone and guarantees you a new phone if you dropped your phone in the toilet, what you get if you purchase a plan that offers you

a used, refurbished, you know, remorse, lemon or maybe a new phone.

THE COURT: Am I remembering correctly that Mr. Tragulus -- and I know I just mispronounced his name --

MR. CUTTER: I probably did too.

THE COURT: -- appeared on the scene for the reply brief?

MR. CUTTER: That's correct, your Honor. We retained him after we were brought into the case and after we saw where we were in terms -- we thought it was appropriate. We wanted to bring more horsepower to bear on that point, and we made him available and, you know, I wouldn't argue with Ms. Preovolos, we would have liked to have had more time for that, but that's -- somehow we thought it was more important to bring that -- that analysis to bear and for the Court to have the benefit of that. I think it's worth keeping in mind that we still are a long way from trial, and there'll be plenty of opportunity to depose and test these theories and make Rule 56 motions as appropriate, but we wanted to have the -- to have the Court -- have our perspective before the Court of what could be a coherent damages model based around the price differential between a solid product that offers you a new phone versus a product that offers you a chance of a new phone, and that would be the core damages model for the people like Ms.

English and the entire class would fall into.

Now, there is an important couple of other classes, and we would think it would be appropriate to get somebody, you know, appropriate representative for what I'll call subclass one, in other words, the people who not only bought the product and overpaid for the product of the warranty plan but then suffered essentially the consequential damages which I would say is recoverable under the CLRA but not under the UCL of getting a used phone and not a new phone, and that price differential is establishable by, you know, market conditions, and I think, as Mr. Tragulus points out, that calculation will benefit Apple because people in the open market have already evidenced their willingness to buy a refurbished phone and will help pay for it versus people who are having it hoisted upon them in the service incident environment. And so that's how we would analyze that.

And then the final category, the subclass that Ms. English remains a member of, is this denied in incident category, and that would be -- what I'd perceive as the damages model that we'd utilize there would be whatever the cost of the phone you had to go out and get because you didn't get your incident model, your incident opportunity minus what you would have paid for the incident opportunity.

THE COURT: Did I miss the evidence on that, though? I mean, the only evidence I saw that would support

Ms. English's theory is what she said.

MR. CUTTER: On the -- on the denial of the incident? No, I think there's a -- there is a document that shows that she came in with a phone, and it says that there was a problem with the phone and that she was not able to -- that it would not qualify for a warranty.

THE COURT: That's it, though? I mean no --

MR. CUTTER: That's correct.

THE COURT: I -- the schedule for this class motion was continued I think a couple of times to make sure that -- and there are all sorts of discovery issues that -- that we worked through over time, and the discovery was a lot broader than I know the Defendant was hoping it was going to be, and I'm left with a record without a lot of common course of conduct in it, and -- and before you -- I let you stop talking, I do want you to speak to the adequacy of counsel issue.

MR. CUTTER: I'd be happy to, your Honor. Interestingly, in the Cole case, Judge Gutierrez had concerns about adequacy of counsel, and he was reassured by the appearance of Girardi Case (phonetic) in that case, and --

THE COURT: Well, they didn't appear for a little bit.

MR. CUTTER: Pardon me?

THE COURT: Ms. Kennedy had I think five or six other lawyers before you. So --

MR. CUTTER: Well, I certainly, you know --

THE COURT: I'm glad to see you.

MR. CUTTER: Thank you, your Honor. I'll address it this way, in two ways. First of all, in my review of the work that's been done, there's been a lot of solid work done with a lot of diligence by a person, you know, making their first foray into this level of litigation against this level of opposition, and -- and really, you know, a little bit of David versus Goliath struggle. And so I appreciate and I honor that work.

The second point I'll bring to bear is that we're in this case. We're committed to it. We're going to see this case through. We feel -- I like the case. I think the merits are -- are strong and that we're used to these fights, you know. I -- I just in the past year have finished a case in front of Judge Selna where I was co-lead in a medical device case involving 1,000 claims. I've been on steering committees. I've been, you know, appointed co-lead in MDL matters. I understand the scale, and I understand the complexity. I'm used to litigating. I have a case going to trial in Santa -- in San Jose next month against both Skadden Arps and Robie Matthai, a certified class action against State Farm. So it's the kind of fight

I'm used to and I expect.

And the last thing I'll say is that I'm also used to working in teams. So I'm happy to work with Ms. Kennedy, but if it ever appears that we need additional resources, I know that I could get those by picking up the telephone. We have people who I've stood shoulder to shoulder with, firms of like caliber to mine who would be happy to jump in with me. So I think my firm's more than adequate to the task, but I know with utmost confidence that we could bring even more resources if we needed to, not -- not to toot my own horn at all but simply because I'm in the case and I'm committed to it and because I've been there for other folks with -- with good firms and have had good success in the past in other matters.

THE COURT: Ms. Preovolos?

MS. PREOVOLOS: Your Honor, I'm struck with the possibility of snatching defeat from the jaws of victory, but I --

THE COURT: No, I think you should -- I think you want to respond to Mr. Cutter.

MS. PREOVOLOS: I do want to respond, but my point in saying that is that if there's -- if there are particular issues the Court wants me to address, let me do that. Otherwise, let me just step through what we've heard here.

But, you know, I want to step back for a minute, and,

you know, I have all kinds of regard for esteemed opposing counsel, and I do, and I don't have any question about his ability, but this case has been going on for two years next month. My client has spent -- you know, I understand it's a large company, but we have spent extraordinary amounts of time and money, and I don't expect that it's fair to say, "Well, no, there are real questions about why this case was broad, about it's -- it's the legitimacy of its foundation, about its source, but we're going to start over right now." I don't think that's fair. I just plain don't think that's fair, and I have a very serious issue with that, particularly in light of the Court -- of the fact that this Court issued an order in March which reflected the constant changing of Plaintiffs and the constant changing of theories and the constant changing of co-counsel, and the Court said "No more." We said, "Your Honor, okay, one more. But please no more after this." And your Honor said "No more." And here we are. This case will be -- will be two years old on November 3rd. I don't think we should have to start back at the beginning, and I feel very strongly about that, and I need to say that. I'm not going to be personal about this, but the time is what it is, and we are where we are, and the discovery has been where it's been.

With respect to the merits and what Mr. Cutter had to say about the merits, he said the product at issue is the

service plan, and I absolutely agree with that, and I think that's very important, particularly when we get to the question of whether the Plaintiffs have come forward with a model that shows or can come forward with a model that shows class wide injury, and that's a gating question. It's not a we decide liability and this doesn't matter. It's a gating question. And as to that gating issue, the issue of whether -- and I think your Honor had it exactly right -- the issue of whether the class paid a price premium, because that's the question, for a plan that said new or equivalent to new in performance and reliability, which I submit, your Honor, means not always new. You know, I want to bring this case back to the real world, and I think your Honor recognizes that that's where we operate.

Doctor Pak (phonetic), with all due respect, doesn't operate in the real world. He has an extreme theory. If you say to a consumer "You're going to get a phone that's new or equivalent to new in reliability and performance," the consumer hears -- at best, consumers will hear different things, but I think a whole lot of those consumers are going to hear "I might get a new phone. I might not get a new phone." In terms of the phone that was -- was high quality, equivalent to new in performance and reliability, although I don't think this is a -- a question on which class certification turns, I do think it's important that I not

stand up here and have my clients' phones called used or lemon phones or that kind of really disrespectful, and I know the counsel's new to the case, but Apple expends extraordinary resources on its remanufacturing phones. It doesn't send a few parts over to -- to China and get them back, and I'm trying to be careful in terms of what's under seal, but Apple tests those parts before the -- the -- the remanufacturing process is identical to the remanufacturing process for a new phone. It's on the same line which is converted. Sometimes it results in a service --

THE COURT: Are you arguing the merits to me now, Ms. Preovolos, or is there something related to the class certification motion in there?

MS. PREOVOLOS: I appreciate -- what I'm -- what I'm arguing is I don't think it's fair, and I don't think there's any evidence in the record to let anybody say lemon phone here.

THE COURT: Okay. All right. So let's go to the class certification motion.

MS. PREOVOLOS: Well, the point that's important for class certification, though, is new or equivalent to new in performance and reliability. I don't -- so I haven't heard any evidence except Doctor Pak's theory that any member of this class would understand that term in a uniform way to mean anything other than a phone that wasn't new, and

I think that's very important. Okay. And if Doctor Pak has a scientific theory, an academic theory -- and I don't take issue with it as an academic theory, okay, but in the real world, in the world where manufacturers supply phones and service plans are sold, in the real world there has been no evidence brought before this Court that Apple's remanufactured phones aren't equivalent to new. Nobody has pointed to a defect for them. We've had two years of discovery. The Plaintiffs haven't requested the phones. They haven't examined the phones. Doctor Pak hasn't tested the phones, and I do think the Court is permitted to go to the merits, you know, sufficient -- so here's the merits issue that the Court does have to look at, right, is there a uniform misrepresentation, would there be a common understanding and common reliance, and your Honor already answered that question.

Ms. English never heard the phrase "equivalent to new in performance and reliability." She never heard it. She didn't rely on it. She didn't read on it. She didn't read it, and the one thing the Ninth Circuit's cases couldn't be more clear about is that the named Plaintiff has to rely, and Mr. Cutter says, well, she relied on a -- on an oral statement "new," but -- but that is -- is exactly what your Honor found wasn't uniform, and you're right about that, and, in fact, it's -- it's undisputed at the time -- at the

point most people bought their service plans, which is not when they bought their phones, there was no representation at all about the nature of the replacement unit. It wasn't part of a conversation.

So there's no uniform misrepresentation. There's no reliance, and there's no evidence in the record that (a) people would have understood new or equivalent to new to mean anything other than refurbished or, indeed, that they would have had any common understanding, and I think what's very important is that Ms. English was asked at her deposition, you know, "Did you consider the term new or equivalent to new?" "No." "Do you have an understanding of the term "New or equivalent to new in performance and reliability?" No, she didn't. She said she didn't have an understanding of that term. So I think Plaintiffs would have an awfully steep hill to climb, as you put it, to show that notwithstanding the fact that the named Plaintiff didn't have an understanding of that phrase, millions of people would have understood it in the academic way Doctor Pak suggests and in the extreme way Doctor Pak suggests. I mean, Doctor Pak says even a new phone isn't really new. It's not quite new. You know, and we now know, if you take our representation and our -- our evidence for the moment that Ms. English's phone was new, she had issues with that phone. She didn't bring it to Apple, but she said she had

freezing problems with that phone.

And that's exactly Doctor Lawl's (phonetic) point, all devices exist along a continuum of reliability, new devices, refurbished devices, and so in the real world, the notion that people -- that there was a -- that there was a common misrepresentation here just doesn't fly, and you have to look, as your Honor has. And with the named Plaintiffs -- and the named Plaintiff didn't have an understanding, and, as your Honor points out, you know, there's no such thing as vicarious oral misrepresentations, and the oral misrepresentation standard in this Circuit is very high. And the Dufore (phonetic) case collects the cases, and it says, you know, there's sort of loose language in some cases like First Alliance that, you know, there's a broader or a looser standard, but when you actually look at the cases, they all involve a memorized or very standardized pitch or representation.

And if you look at the sales person testimony here, what you learn is, one, most of the time when the service plan was purchased, it wasn't even talked about because wanted to know, "Do I get a replacement if I drop my phone? How much will it cost? How long is the coverage?" The nature of the unit wasn't a focus of the conversation, but when asked, the testimony of the sales people make clear that it was very very variable, and to say, you know, that

Ms. English heard new and thought, you know, like new or equivalent to new in performance and reliability meant the same thing, she was asked that at her deposition, and that's not what she said. You know, that's counsel's creation.

With respect to scienter or the notion that Apple hid the fact that the phone might be refurbished, again, new or equivalent to knew in performance and reliability means remanufactured, not new. The terms and conditions that Ms. English signed at the time her phone was repaired, I think it's important to note this is all one transaction. So Ms. English's son breaks the phone. Ms. English walks into the store She gets a -- a repair or service event, which is the replacement -- the out of warranty replacement. She buys the Apple Care Plan. It all happens at once. And she walks out of the store -- she signs that receipt at the time she's handed the phone, and it says "refurbished." I can't, because I wasn't there, you know, swear to, you know, the instance in time, but before she left the store, she signed a device that -- she signed a disclosure that said refurbished. Why did Apple use refurbished on the repair terms and not use refurbished in the terms and conditions? Your Honor, I honestly don't know, and I've tried to find out. My guess is they were written by different people with different mind-sets. But -- but -- and I think there is certainly a view at Apple that Apple's -- and I'm not trying

to get into the merits. I'm trying to tell you where this comes from, okay.

THE COURT: I'm really struggling to -- with your argument because it does seem so -- you're so wrapped up with the -- why Apple's right, that I'm not --

MS. PREOVOLOS: Well, no.

THE COURT: -- that I'm having trouble with the, you know, commonality, typicality, adequacy, those things.

MS. PREOVOLOS: That's the whole point. There was no common understanding of these terms. There wasn't even common exposure to them, right. I mean, that's what your Honor said, and that's right. But the -- the point -- so the point about refurbished, though, is if Apple -- it doesn't -- so I don't think it's going to the merits to talk about what people knew and what people were told and what the common understanding might be, okay. And -- and if Apple had documents out in the world saying refurbished, refurbished, refurbished, was that really omitted or concealed seriously? I mean, can that seriously be argued here? I don't think so. Refurbished was out there.

THE COURT: What about damages, if you would?

MS. PREOVOLOS: Okay. And that was almost the place that I went first because Mr. Cutter says the measure of damages is the difference in value between the plan as represented and the plan as received, right. The plan as

represented -- and I do have to come back to the plan said new or equivalent to new. It did not say brand new, and I'm not going to argue the merits, but that was the statement, and how people understood it matters, but in terms of damages, I think what's important is that neither, what -- neither Doctor Almond nor Mr. Tragulus come anywhere close to addressing the question your Honor has asked.

So did they do a consumer survey or did they design a consumer survey to get at how people would have understood those terms and whether they would have seen a difference in the plans? No, they didn't. Critically, we know that Ms. English bought another service plan. She bought the Best Buy Geek Squad plan, and that plan actually cost more. It said refurbished all over it, and it cost more. It cost more to buy it. It cost $278, and it cost more to get an accidental damage incident, and it only provided one incident, and -- and, you know, so in the but for world, I'm not convinced -- not only am I not convinced, the only evidence we have is that there was no price premium, and my speculation -- and, you know, beat me if it's the merits, but my speculation is it's because Apple's plan said new or functionally equivalent to new. The Geek Squad plan said refurbished, and the consumers weren't drawing a dime of difference, and -- and Doctor Almond says "I don't have to do a consumer survey. That's not the point." He says "I

don't have to look at -- at other service plans." And Mr. Tragulus says, "Nothing more here. That's not what I would do." And I'm sorry, your Honor. Really? Are we going to start now with damages experts after class cert? Because the Plaintiffs are supposed to come in at class cert and prove up a damages model that can trace injury from their theory of harm to the class and not other harm, and I just think you can't do that here for a bunch of reasons. Number one, I still submit Plaintiff didn't read or rely on the core representation the Plaintiffs are relying on. She said when asked that she didn't have a particular understanding of it.

I submit that if Plaintiffs had done a consumer survey -- and this does matter for uniformity, right? If the Plaintiffs had done a consumer survey, you wouldn't find a common interpretation of that term or a common consumer understanding of that term, and, yes, you can presume class-wide reliance where the named Plaintiff relied, right, and -- and where there was uniform exposure.

We don't have either of those things here, and we don't have a damages model that works, you know. Doctor Almond's model was riddled with errors and problems, and -- and it doesn't measure what the Court, I think, correctly suggests it has to measure, and I'm not convinced you can measure that, and the evidence we've seen is that if you do measure

that, you'll conclude there was no damage, there was no price premium.

And so I think there are huge problems, and I just don't think it's fair to my client for counsel t say let's just start over, you know. And Tragulus, by the way, doesn't solve our problem because Tragulus talks about how you measure damages, and I do think this is important. Tragulus doesn't talk about restitution, doesn't talk about the test your Honor uses, doesn't talk about the test in Google Ads, doesn't talk about the (indiscernible) test. He says "I'm an expert, and I cite all these authorities about how you calculate future profits in a business case, how -- how you calculate" -- he cites all those authorities about how to calculate lost future profits in a business case. He has not said we can figure out the price premium here, and I think it's -- that was supposed to be done now, you know. He didn't have to complete his class-wide model, but, you know, as Judge Koh said in Mordiba (phonetic), you know, this court is not a rubber stamp. You can't just stand up and say we have a damages model and, you know, it's a damages model and so what if it doesn't work or we'll fix all the problems later. You know, that's just not right, particularly where we have a service plan here, and -- a competing service plan which -- which, by the way, also torpedoes the core reliance theories in this case because

Ms. English says "I wouldn't have bought the Apple plan, and I wouldn't have paid as much for it if I knew that I might get a not new phone." And then she says "I really like the Best Buy plan. They disclosed that I got refurbished phones. I always got refurbished phones. They had exactly the same freezing problem as the Apple phones, and, by the way, it costs more." I just -- where's the commonality? Where's the reliance? Where's the injury? Where's the credibility of materiality?

So I think this case has very serious problems. I think Plaintiffs have had multiple times chances to fix them. Your Honor permitted a reply expert to come in, a brand new expert, and he didn't even address the proper measure of damages here. He didn't try. And I don't think at the end of the day the problems are cured because functionally equivalent to new in performance and reliability is not going to -- it is not false on its face. It's only false if you listen to Mr. Tragulus, right. And so that means you have to look at how consumers would understand it, and we don't have any evidence here that consumers would understand it in a uniform way that makes it deceptive, and we know that Ms. English had no particular understanding of it at all. So that's one big problem.

There are no uniform oral representations under the case law in this Circuit. We all know that. I think that's

clear. The named Plaintiff didn't rely. She went out and bought a plan that had the defect she claims this plan had, and she paid more for it. So I don't think there was a price premium in the marketplace. So -- so I just think this case fails. There's just no predominance in all kinds of different places.

THE COURT: Mr. Cutter, I'll give you just a few minutes if you'd like to respond, but I think we're -- we've exposed most of these issues.

MR. CUTTER: Yeah, and I think there are a few important points. First of all, this is as clear a script case as there is. There's a single core phrase that predominates everywhere. It's in the terms and conditions. It's in Apple Care Plus. It's the only phrase that is consistently referred to in training, and it's the phrase that Ben Bund, that Tara Ford, that all the Apple employee witnesses testified they used. They said new or like new. They said new or equivalent to new in performance and reliability. So that's the core phrase, and we don't need vicarious reliance to say it. It's there. It's written. It permeates everything that Apple does, and it's the only phrase that they ever taught people to use, and they were very careful and deliberate about it. So I feel very comfortable with that line of cases.

As to the nature of the phrase and its falsity, you

know, plenty of cases say that's merits, but I think we've put more than enough evidence before the Court to show that it's a -- it's a false statement. I'll just leave it at that. Doctor Pak is preeminent. I'm confident that if and when he testifies before this Court, you'll find him persuasive and dispositive on that issue.

As to -- and just comparing it to cases that have been certified, you know, read through the analysis in Kashi, read through the analysis in Blue Diamond of "all natural." To me this phrase is every bit as misleading and every bit one that -- and the analysis in Cole. Those are all very much in the same vein as this case, and Ms. English in terms of commonality, she's the -- she's the person who's told you'd get new phones. That's a piece of the statement that's false. The cases are clear that you don't need to have been told every piece of the representation to establish reliance. That's Cole that discusses that very clearly in terms of the brochure that was partially read to the Plaintiff in that case.

So I think we're on very solid ground in terms of representations and the reliance. The damages argument that you just heard was incomplete at best. Mr. Tragulus said clearly that consumer surveys could and should be used to establish the differential in this case, and their expert -- Cox I believe his name is -- testified that consumer surveys

were an adequate and recognized way of establishing a damages model like this, and so we have agreement among the economists that you can establish a damages model using a consumer survey, which is exactly what we're going to do in this case. We were required to do the consumer survey before class certification? No. I think what we're required to do is establish that there is a plausible manageable way in which damages can be googled, and I think we've established that, and -- oh, the other point I wanted to make is this red herring about the Geek Squad plan. She opted for a plan with a monthly payment. You know, we all know how these finance companies get you. In the long run you pay more for a monthly payment. It has some superficial appeal up front. You're paying $10 or $15 a month. In the long run she ended up paying more, but it's in no way any kind of evidence that undercuts our damages theory in this case.

THE COURT: All right. Thank you both. It will take me a little bit to -- to generate an order on this, and in that order I will undoubtedly include what the next steps are. So --

MR. CUTTER: Thank you, your Honor.

THE COURT: -- which may be nothing, may be everything. You never know.

MR. CUTTER: Thank you, your Honor.

THE COURT: Okay. Thank you.

(Proceedings adjourned at 4:05 p.m.)

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

Echo Reporting, Inc., Transcriber

Thursday, February 11, 2016